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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of the)	CC Docket No. 96-115
Telecommunications Act of 1996)	
)	
Telecommunications Carriers' Use)	
of Customer Proprietary Network)	
Information and Other)	
Customer Information)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions of the Telecommunications Act)	
of 1996)	
)	
Provision of Directory Listing Information)	CC Docket No. 99-273
Under the Communications Act of 1934,)	
As Amended)	
)	

**CONSOLIDATED OPPOSITION AND COMMENTS OF
THE ASSOCIATION OF DIRECTORY PUBLISHERS**

Philip L. Verveer
Theodore Whitehouse
Sophie J. Keefer

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036-3384
Tel. (202) 328-8000

Its Attorneys

11 January 2000

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SUMMARY

The Association of Directory Publisher ("ADP") provides its Consolidated Opposition and Comments in response to various reconsideration petitions of the Third Report and Order in this proceeding. Specifically, ADP requests that the Commission:

- (i) reject Bell Atlantic's suggestion that a carrier be permitted to immediately cease providing SLI to a publisher if the carrier believes that the publisher is misusing the SLI because adoption of this suggestion would encourage anticompetitive behavior by carriers, and, in any event, is unnecessary;
- (ii) continue to prohibit a carrier from charging a publisher for listings that the publisher does not use if the publisher's request for unbundling is reasonable and the carrier's internal systems can not accommodate the request;
- (iii) reject NTCA's proposal for a \$0.42 per listing presumptively reasonable benchmark rate for small and rural telephone companies because this rate is unsupported by reliable evidence and is based on the "market" value of the listings; and
- (iv) continue to require a carrier to provide to a requesting independent directory publisher copies of contracts governing provision of SLI to the carrier itself, its affiliates, or an entity that publishes directories on the carrier's behalf.

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**CONSOLIDATED OPPOSITION AND COMMENTS OF
THE ASSOCIATION OF DIRECTORY PUBLISHERS**

The Association of Directory Publishers ("ADP"), by its attorneys, hereby files this Consolidated Opposition and Comments to various reconsideration petitions in the above captioned proceeding.¹

¹ In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Third Report and Order, FCC 99-227 (rel. Sept. 9, 1999) ("Third Report and Order"). The Third Report and Order was published in the Federal Register on October 5, 1999. See 64 Fed. Reg. 53944 (Oct. 5, 1999). Petitions for Reconsideration were filed on November 5, 1999. On December 3, 1999, the Commission released a Public Notice stating Oppositions to these Petitions would be due on or before January 11, 2000. See Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, Report No. 2374 (rel. Dec. 3, 1999).

I. CONTRARY TO BELL ATLANTIC'S PETITION, THE COMMISSION SHOULD NOT PERMIT CARRIERS TO CEASE PROVIDING SLI TO PUBLISHERS IF THE CARRIER BELIEVES THAT THE PUBLISHER IS MISUSING THE SLI; SUCH RELIEF WOULD ENCOURAGE ANTICOMPETITIVE BEHAVIOR BY CARRIERS AND IS UNNECESSARY.

Bell Atlantic requests that the Commission permit carriers to cease providing SLI to a publisher if the carrier believes that the publisher is misusing the SLI.² Bell Atlantic argues that otherwise there is no practical way for a carrier to take effective action or get a "quick determination" if a publisher is misusing a carrier's data.³ Bell Atlantic claims that "carriers will have to look to the courts for vindication of their rights, which in many cases is a slow, ineffective remedy."⁴ ADP opposes Bell Atlantic's request because (1) it would competitively disadvantage independent directory publishers; and (2) it is unnecessary.

Bell Atlantic's request would encourage anticompetitive conduct by carriers and frustrate Congress' intent of promoting competition in the directory publishing market. The Commission recognized in the Third Report and Order that Congress "enacted Section 222(e) to redress a market failure" that stems from carriers' "unique control and access to accurate subscriber list information."⁵ Congress intended that the Commission adopt rules to minimize the burdens on publishers and prevent carriers from using their control over SLI to impede competition.⁶ Permitting carriers to cease providing SLI to

² Bell Atlantic Petition, at 6.

³ Id.

⁴ Id.

⁵ Third Report and Order, at ¶ 89.

⁶ Id. at ¶ 115.

publishers based solely on the carrier's belief that the publisher may be misusing the SLI would not serve these goals. Rather, it would allow carriers to use their ability to unilaterally cease providing SLI to publishers in order to gain a competitive advantage.⁷ This result is inconsistent with Congress' intent in enacting section 222(e).

Moreover, misuse of SLI by directory publishers is not a widespread problem. Indeed, Bell Atlantic cites no examples of instances in which a publisher has misused SLI obtained from Bell Atlantic or any other carrier. ADP is aware of no such instances among its members. In the unlikely event that a publisher misuses SLI, there are many avenues for relief available to a carrier. A carrier could ask the FCC's Enforcement Bureau to contact the publisher to determine whether misuse has occurred. A publisher would respond promptly to FCC staff inquiries because its ability to receive SLI is at stake. A carrier could seek injunctive relief from a court of appropriate jurisdiction. If the contract between the parties contains an arbitration clause, a carrier could request that the publisher participate in arbitration. Finally, a carrier could notify the publisher that the carrier believes the publisher is misusing the SLI and ask for assurances from the publisher that it will cease to do so in the future. Hence, the relief requested by Bell Atlantic in its Petition is unnecessary and should not be granted.

II. CARRIERS MAY NOT CHARGE A PUBLISHER FOR LISTINGS THAT THE PUBLISHER DOES NOT USE IF THE CARRIER'S INTERNAL SYSTEMS CAN NOT ACCOMMODATE THE REQUEST AND THE PUBLISHER'S REQUEST FOR UNBUNDLING IS REASONABLE.

Bell Atlantic requests that the Commission make clear that "a carrier is under no obligation to provide a publisher with subscriber list information 'unbundled' on some

⁷ Id.

demographic basis -- all senior citizens in Bethesda or all families with children in Rockville."⁸ Similarly, Bell Atlantic seeks confirmation that the Commission will not permit publishers to request "listing on a geographic basis that is unrelated to the way the carrier collects and maintains the information -- all homes within one block of the beach."⁹ Bell Atlantic therefore requests that the Commission "confirm that the 'unbundling' obligation' does not extend to requests of this sort and that section 64.2317(d) of the Rules does not excuse publishers who make requests that go beyond the required unbundling from paying for all listings they acquire."¹⁰

ADP agrees that publishers should not be entitled to request unbundling of the sort described by Bell Atlantic. However, it remains true that if an unbundling request is reasonable and the carrier can not accommodate the request, a publisher is only required to pay for those listings it uses. For example, a publisher may request listings by geographic area such as NXX or zip code, or other reasonable criteria, or by service order activity, such as new connects only. If a carrier is unable to comply with the request, the publisher is not required to pay for those listings the publisher does not use.¹¹

⁸ Bell Atlantic Petition, at 7.

⁹ Id. at 7-8.

¹⁰ Id. at 8-9.

¹¹ Third Report and Order, at ¶ 66. Moreover, in any dispute over the level of unbundling that can be accommodated, "the burden will be on the carrier to show its internal systems cannot accommodate the request." Id. at ¶ 69.

III. THE COMMISSION SHOULD REJECT NTCA'S PETITION REQUESTING THAT IT AMEND ITS RULES TO INCLUDE A \$0.42 PER LISTING PRESUMPTIVELY REASONABLE RATE FOR SMALL AND RURAL TELEPHONE COMPANIES BECAUSE NTCA'S EVIDENCE IS BASED ON THE "VALUE" OF THE LISTINGS TO NTCA'S MEMBERS.

The NTCA Petition is replete with accusations of "threatening," "coercive," and "harassing" behavior by independent directory publishers. However, a review of the letters received by carriers from independent publishers attached to NTCA's Petition reveals that ADP's members have sent business-like letters to carriers from whom they currently purchase listings or from whom they would desire to purchase listings in the future.

In fact, NTCA disparages independent publishers for seeking to enforce their legal right to purchase SLI under reasonable and non-discriminatory rates, terms, and condition. That some carriers do not like the options they face -- either to comply with the FCC's presumptively reasonable benchmarks of four and six cents per listing, or to develop a cost study to justify higher rates -- is not surprising. Many carriers have charged excessive prices for SLI for years and would like to continue to do so in the future. For this reason, Congress enacted section 222(e).

NTCA urges the Commission to adopt a presumptively reasonable benchmark rate of \$0.42 per listing for small and rural telecommunications companies based on the "new evidence" it provides in its Petition.¹² NTCA's "new" evidence is woefully inadequate. Of its more than 500 members, only 28 supplied NTCA with SLI rates purported to be based on cost studies.¹³ In addition, 106 carriers "provided NTCA with subscriber list rates

¹² NTCA Petition, at 6-7.

¹³ Id. at 6.

based on market value."¹⁴ However, the Commission has rejected "the idea that incumbent LECs be allowed to charge either whatever they want or value-based prices for subscriber list information."¹⁵ Accordingly, NTCA's Petition should be summarily dismissed by the Commission.

IV. THE COMMISSION SHOULD CONTINUE TO REQUIRE EACH CARRIER TO MAKE AVAILABLE TO PUBLISHERS CONTRACTS GOVERNING THE PROVISION OF SLI TO ITSELF, AN AFFILIATE, OR ANY ENTITY THAT PUBLISHES DIRECTORIES ON THE CARRIER'S BEHALF.

Each carrier is required to make available to requesting directory publishers contracts the carrier has executed governing the provision of SLI to itself, an affiliate, or an entity that publishes directories on the carrier's behalf.¹⁶ ALLTEL contends that the rule is "overly broad."¹⁷ However, these requirements are narrowly tailored to ensure that a carrier's directory publishing operations do not enjoy a competitive advantage over independent directory publishers.¹⁸ By allowing independent publishers access to a carrier's contracts with publishers with whom the carrier is affiliated or is involved in a business undertaking, the carrier will be deterred from discriminating against independent publishers. Moreover, NTCA's suggestion that a publisher first petition the Commission for access to contracts -- subject to in camera review by Commission staff and a protective

¹⁴ Id. at 7.

¹⁵ Third Report and Order, at ¶ 86.

¹⁶ Id. at ¶ 58.

¹⁷ ALLTEL Petition, at 2.

¹⁸ Id. at 3.

order -- would squander administrative resources that would be better used to resolve disputes between parties concerning SLI.¹⁹

ALLTEL also claims that these requirements "confer[] only on one group of market participants (the independent directory publishers) the unilateral right to compel another group of market participants (publishers with carrier agreements) to disclose the most intimate terms of their business relationship."²⁰ However, these requirements are intended to prevent a carrier from discriminating against independent publishers in favor of publishers with whom the carrier is affiliated or is involved in a business undertaking. Hence, these requirements do not confer a benefit on independent publishers; rather, they allows an independent competitor to detect discrimination against it by the carrier without the need for Commission involvement.

ALLTEL also claims that these requirements would violate the publishing company's right to maintain confidentiality of agreements.²¹ But disclosure of the details of these relationships to independent publishers is necessary to ensure that carriers do not discriminate against independent publishers. The carrier will already have knowledge of the details of its contractual relationship with the independent directory publisher. To the extent that portions of the agreements may not be related to provision of SLI, these portions would not need to be disclosed. Therefore, NTCA's Petition should be dismissed.

¹⁹ Id. at 4.

²⁰ Id. at 3.

²¹ Id. at 2-3.

V. CONCLUSION.

ADP respectfully urges the Commission to take the actions outlined herein.

Respectfully submitted,

**THE ASSOCIATION OF
DIRECTORY PUBLISHERS**

By:



Philip L. Verveer
Theodore Whitehouse
Sophie J. Keefer

WILLKIE FARR & GALLAGHER

Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036-3384
Tel. (202) 328-8000

Its Attorneys

11 January 2000

CERTIFICATE OF SERVICE

I, Sophie J. Keefer, do hereby certify that on this 11th day of January, 2000, copies of the foregoing Consolidated Opposition and Comments of the Association of Directory Publishers were served via hand delivery to the following parties:

The Honorable William E. Kennard
Chairman
Federal Communications Commission
Rm. 8-B201
445 12th Street, SW
Washington, DC 20554

The Honorable Michael K. Powell
Federal Communications Commission
445 12th Street, SW
Rm. 8-A204
Washington, DC 20554

The Honorable Susan Ness
Federal Communications Commission
Rm. 8-B115
445 12th Street, SW
Washington, DC 20554

The Honorable Gloria Tristani
Federal Communications Commission
Rm. 8-C302
445 12th Street, SW
Washington, DC 20554

The Honorable Harold Furchtgott-Roth
Federal Communications Commission
Rm. 8-A302
445 12th Street, S.W.
Washington, DC 20554

Al McCloud
Common Carrier Bureau
Network Service Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

William A. Kehoe, III
Common Carrier Bureau
Federal Communications Commission
Rm. 5-C312
445 12th Street, S.W.
Washington, DC 20554

Lawrence E. Strickling, Chief
Common Carrier Bureau
Federal Communications Commission
Rm. 5-C345
445 12th Street, S.W.
Washington, DC 20554

Daniel R. Shiman
Common Carrier Bureau
Federal Communications Commission
Rm. 5-B155
445 12th Street, S.W.
Washington, DC 20554

John M. Goodman
Bell Atlantic
1300 I Street, N.W.
Washington, D.C. 20005

Kathryn Marie Krause
US WEST COMMUNICATIONS, INC.
1020 19th Street, N.W.
Suite 700
Washington, D.C. 20036

L. Marie Guillory
Daniel Mitchell
National Telephone Cooperative Association
4121 Wilson Boulevard
10th Floor
Arlington, VA 22203

Glenn S. Rabin
Assistant Vice President
Federal Regulatory Affairs
ALLTEL Services Corporation
601 Pennsylvania Avenue, N.W.
Suite 720
Washington, D.C. 20004

ITS, Inc.
1320 20th Street, N.W.
Washington, D.C. 20036



Sophie J. Keefer